IP 06-0001-M 1 KPF USA v Sowell & Loving
Magistrate Kennard P. Foster Signed on 1/20/06

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

USA,	)	
	)	
Plaintiff,	)	
vs.	)	
	)	
ZACHARIUS SOWELL,	)	CAUSE NO. IP06-0001-M-01-F
LIVI LOVING,	)	02
	)	
Defendant.	)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CAUSE NO. IP 06-01M-
	)	
ZACHARIUS SOWELL,	)	01
LIVI LOVING,	)	02
	)	
Defendants.	)	

ENTRY AND ORDER OF DETENTION PENDING TRIAL

SUMMARY

The defendants are charged in a criminal complaint issued on January 6, 2006, with one count of conspiracy to possess with intent to distribute and/or distribute 500 grams or more of a mixture or substance containing a detectable amount of cocaine, a Schedule II, Narcotic Controlled Substance, in violation of Title 21 U.S.C. §§841(a)(1) and 846, and one count of possession with intent to distribute 500 grams or more of a mixture or substance containing a detectable amount of cocaine, a Schedule II, Narcotic Controlled Substance, in violation of Title 21 U.S.C. §841(a)(1). Defendant Loving is also charged with unlawful possession of a firearm after being convicted of a felony offense, in violation of Title 18 U.S.C. §922(g).

On January 6, 2006, at the initial appearance, the government filed a written motion and moved for detention pursuant to Title 18 U.S.C. §§3142(e), (f)(1)(C), and (f)(2)(A), on the grounds that the defendants are charged with a drug trafficking offense with the maximum

term of imprisonment of ten years or more is prescribed in the Controlled Substances Act, and that the defendants are a serious risk of flight, if released.

The preliminary hearing and detention hearing were held on January 13, 2005. The United States appeared by Barry D. Glickman, Assistant United States Attorney. Zacharius Sowell appeared in person and by his appointed counsel, Kevin McShane. Livi Loving appeared in person and by his appointed counsel, James C. McKinley, Assistant Federal Community Defender.

At the preliminary hearing, the Government rested on the complaint and the affidavit attached thereto and tendered Special Agent Daniel Schmidt, Drug Enforcement Administration (DEA), for cross examination. Counsel for each defendant examined Special Agent Schmidt on all issues before the Court. The defendants presented no additional evidence in the preliminary hearing, and the preliminary issue as to the defendants were submitted to the Court. The Court found that the evidence constituted probable cause to believe that the defendants committed the crimes charged in the complaint. The charges in the criminal complaint give rise to the presumptions that there are no condition or combination of conditions of release which will reasonably assure the safety of the community or that the defendants will not be a serious risk to flee if released.

Neither of the defendants rebutted either the presumption that they are a danger to the community or the presumption that they are a risk of flight and, consequently, were ordered detained.

FINDINGS OF FACT AND

CONCLUSIONS OF LAW

1. The defendants are charged in a criminal complaint issued on January 6, 2006, with one count of conspiracy to possess with intent to distribute and/or distribute 500 grams or more of a mixture or substance containing a detectable amount of cocaine, a Schedule II, Narcotic Controlled Substance, in violation of Title 21 U.S.C. §§841(a)(1) and 846, and one count of possession with intent to distribute 500 grams or more of a mixture or substance containing a detectable amount of cocaine, a Schedule II, Narcotic Controlled Substance, in violation of Title 21 U.S.C. §841(a)(1). Defendant Loving is also charged with unlawful possession of a firearm after being convicted of a felony offense, in violation of Title 18 U.S.C. §922(g).

2. The penalty for each of the drug offense counts in the criminal complaint is a mandatory minimum sentence of five years and a maximum of forty years imprisonment. See 21 United States Code, Section 841(b)(1)(B)(ii).

3. The Court takes judicial notice of the criminal complaint in this cause. The Court further incorporates the evidence admitted during the preliminary hearing and the detention hearing, as if set forth here.

4. The Government rested on the complaint and the affidavit attached thereto and tendered Special Agent Daniel Schmidt, DEA, for cross examination. Counsel for each defendant examined Special Agent Schmidt on all issues before the Court. The defendants presented no additional evidence in the preliminary hearing, and the preliminary issue as to the defendants were submitted to the Court.

5. The Court finds there is probable cause for the offenses the defendants are charged with in the complaint, and the rebuttable presumptions arise that the defendants are a serious risk of flight and a danger to the community. Title 18 U.S.C. § 3142(e).

6. The Court admitted a Pre-Trial Services Report (PS3) regarding defendant Zacharius Sowell on the issue of his release or detention. Mr. Sowell is age 24 (DOB 10-6-81). The PS3 indicates the following:

(A) On June 3, 1997, Mr. Sowell was convicted of Possession of Cocaine and Visiting A Common Nuisance. Mr. Sowell was a juvenile at the time and a true finding was entered.

(B) On January 4, 2000, Mr. Sowell was convicted of Dealing in Cocaine (Class A Felony) and Possession of Cocaine (Class C Felony) in Marion County Indiana Superior Court. He was sentenced to a term of 20 years imprisonment (5 years executed) and placed on two years of probation on the Dealing charge. He was sentenced to a concurrent term of 2 years executed and two years probation on the Possession charge.

(C) On March 2, 2001, Mr. Sowell was convicted of Visiting A Common Nuisance in Marion County Indiana Superior Court. He was sentenced to 180 days imprisonment (178 days suspended) and was fined $25.

(D) Mr. Sowell has failed to appear for court proceedings on two previous occasions.

7. The Court admitted a Pre-Trial Services Report (PS3) regarding defendant Livi Loving on the issue of his release or detention. Mr. Loving is age 27 (DOB 8-24-78). The PS3 indicates the following:

(A) On December 22, 1988, and October 9, 1994, Mr. Loving convicted of Conversion. Mr. Loving was a juvenile at the time and a true finding was entered.

(B) On July 17, 1999, Mr. Loving was convicted of Possession of Cocaine (Class C Felony) in Marion County Indiana Superior Court. He was sentenced to a term of 4 years imprisonment (2 years executed) and placed on two years of probation. On June 13, 2005, Mr. Loving was found to have violated the terms of his probation. On August 4, 2005, a failure to appear warrant was issued.

(C) On July 26, 2000, Mr. Loving was convicted of Possession of Marijuana and Driving While License Suspended in Marion County, Indiana Superior Court. He was sentenced to a term of 365 days imprisonment (2 days executed, 363 days suspended) and placed on six months probation.

(D) On June 8, 2005, Mr. Loving was arrested and charged with Possession of Marijuana (Class D Felony) in Marion County, Indiana. On June 21, 2005, and July 18, 2005, failure to appear warrants were issued.

(E) The PS3 indicates that Mr. Loving has failed to appear for court proceedings on six previous occasions and has two active failure to appear warrants. Additionally, Mr. Loving tested positive for cocaine, THC, and opiates after a Court ordered drug screen was administered by U.S. Probation.

8. The defendants have failed to rebut the presumption that they are a serious risk of flight, and a danger to the community and any other person. Therefore, Zacharius Sowell and Livi Loving are ORDERED DETAINED.

9. When a motion for pretrial detention is made, the Court engages a two-step analysis: first, the judicial officer determines whether one of six conditions exists for

considering a defendant for pretrial detention; second, after a hearing, the Court determines whether the standard for pretrial detention is met. *United States v. Friedman*, 837 F.2d 48, 49 (2nd Cir. 1988).

A defendant may be considered for pretrial detention in only six circumstances: when a case involves one of either four types of offenses or two types of risks. A defendant is eligible for detention upon motion by the United States in cases involving (1) a crime of violence, (2) an offense with a maximum punishment of life imprisonment or death, (3) specified drug offenses carrying a maximum term of imprisonment of ten years or more, or (4) any felony where the defendant has two or more federal convictions for the above offenses or state convictions for identical offenses, 18 U.S.C. § 3142(f)(1), or, upon motion by the United States or the Court *sua sponte*, in cases involving (5) a serious risk that the person will flee, or (6) a serious risk that the defendant will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, a prospective witness or juror. *Id.*, §3142(f)(2); *United States v. Sloan*, 820 F.Supp. 1133, 1135-36 (S.D. Ind. 1993). The existence of any of these six conditions triggers the detention hearing which is a prerequisite for an order of pretrial detention. 18 U.S.C. §3142(e). The judicial officer determines the existence of these conditions by a preponderance of the evidence. *Friedman*, 837 F.2d at 49. *See United States v. DeBeir*, 16 F.Supp.2d 592, 595 (D. Md. 1998) (serious risk of flight); *United States v. Carter*, 996 F.Supp. 260, 265 (W.D. N.Y. 1998) (same). In this case, the United States moves for detention pursuant to §3142(f)(1)(C), and (f)(2)(A) and the Court has found these bases exist.

Once it is determined that a defendant qualifies under any of the six conditions of §3142(f), the court may order a defendant detained before trial if the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person

as required and the safety of any other person and the community. 18 U.S.C. §3142(e). Detention may be based on a showing of either dangerousness or risk of flight; proof of both is not required. *United States v. Fortna*, 769 F.2d 243, 249 (5th Cir. 1985). With respect to reasonably assuring the appearance of the defendant, the United States bears the burden of proof by a preponderance of the evidence. *United States v. Portes*, 786 F.2d 758, 765 (7th Cir. 1985); *United States v. Himler*, 797 F.2d 156, 161 (3rd Cir. 1986); *United States v. Vortis*, 785 F.2d 327, 328-29 (D.C. Cir.), *cert. denied*, 479 U.S. 841, 107 S.Ct. 148, 93 L.Ed.2d 89 (1986); *Fortna*, 769 F.2d at 250; *United States v. Chimurenga*, 760 F.2d 400, 405-06 (2nd Cir. 1985); *United States v. Orta*, 760 F.2d 887, 891 & n. 20 (8th Cir. 1985); *United States v. Leibowitz*, 652 F.Supp. 591, 596 (N.D. Ind. 1987). With respect to reasonably assuring the safety of any other person and the community, the United States bears the burden of proving its allegations by clear and convincing evidence. 18 U.S.C. § 3142(f); *United States v. Salerno*, 481 U.S. 739, 742, 107 S.Ct. 2095, 2099, 95 L.Ed.2d 697 (1987); *Portes*, 786 F.2d at 764; *Orta*, 760 F.2d at 891 & n. 18; *Leibowitz*, 652 F.Supp. at 596; *United States v. Knight*, 636 F.Supp. 1462, 1465 (S.D. Fla. 1986). Clear and convincing evidence is something more than a preponderance of the evidence but less than proof beyond a reasonable doubt. *Addington v. Texas*, 441 U.S. 418, 431-33, 99 S.Ct. 1804, 1812-13, 60 L.Ed.2d 323 (1979). The standard for pretrial detention is "reasonable assurance"; a court may not order pretrial detention because there is no condition or combination of conditions which would *guarantee* the defendant's appearance or the safety of the community. *Portes*, 786 F.2d at 764 n. 7; *Fortna*, 769 F.2d at 250; *Orta*, 760 F.2d at 891-92.

10. A rebuttable presumption that no condition or combination of conditions will reasonably assure the defendants' appearance or the safety of any other person and the

community arises when the judicial officer finds that there is probable cause to believe that the defendant committed an offense under (1) the Controlled Substances Act, 21 U.S.C. § 801 *et seq.*; the Controlled Substances Import and Export Act, 21 U.S.C. § 951 *et seq.*, or the Maritime Drug Law Enforcement Act, 46 U.S.C. App. § 1901 *et seq.*, for which a maximum term of imprisonment of ten years is prescribed; (2) 18 U.S.C. § 924(c); (3) 18 U.S.C. § 956(a); or (4) 18 U.S.C. § 2332b. 18 U.S.C. § 3142(e).

This presumption creates a burden of production upon a defendant, not a burden of persuasion: the defendant must produce a basis for believing that he will appear as required and will not pose a danger to the community. Although most rebuttable presumptions disappear when any evidence is presented in opposition, a § 3142(e) presumption is not such a "bursting bubble". *Portes*, 786 F.2d at 765; *United States v. Jessup*, 757 F.2d 378, 383 (1st Cir. 1985). Therefore, when a defendant has rebutted a presumption by producing some evidence contrary to it, a judge should still give weight to Congress' finding and direction that repeat offenders involved in crimes of violence or drug trafficking, as a general rule, pose special risks of flight and dangers to the community. *United States v. Dominguez*, 783 F.2d 702, 707 (7th Cir. 1986) (presumption of dangerousness); *United States v. Diaz*, 777 F.2d 1236, 1238 (7th Cir. 1985); *Jessup*, 757 F.2d at 383.

The Court has found the presumptions arise in this case and have not been rebutted.

11. If the defendants had rebutted the presumptions, the Court would consider the evidence presented on the issue of release or detention weighed in accordance with the factors set forth in 18 U.S.C. § 3142(g) and the legal standards set forth above. Among the factors considered both on the issue of flight and dangerousness to the community are the defendants character, physical and mental condition, family ties, employment, financial resources, length

of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearances at court proceedings. 18 U.S.C. § 3142(g)(3)(A). The presence of community ties and related ties have been found to have no correlation with the issue of safety of the community. *United States v. Delker*, 757 F.2d 1390, 1396 (3rd Cir. 1985); S.Rep. No. 98-225, 98th Cong., 1st Sess. at 24, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3207-08.

12. In this regard, the Court finds and concludes that the evidence in this case demonstrates the following:

a. On January 5, 2006, law enforcement agents from the DEA and the Indianapolis Police Department Drug Interdiction Unit, utilized a confidential source (CS) to conduct a drug transaction with Livi Loving in which Loving agreed to meet and sell the CS approximately nine ounces of crack cocaine in the parking lot of the Menard's located at Pendleton Pike and 38th Street on the eastside of Indianapolis.

b. At approximately 5:00 PM, law enforcement agents, who were conducting surveillance, saw Loving driving a white GMC Yukon through the Menard's parking lot. Loving parked his vehicle next to the CS's vehicle. Law enforcement agents observed Loving move his vehicle a short distance and park next to a white Chevrolet Blazer.

c. Loving was seen leaving the Yukon and entering the Blazer carrying a white sack. As law enforcement approached the Yukon and the Blazer, Zacharius Sowell, the driver of the Blazer, was observed putting a large amount of U.S. Currency on the dashboard of the Blazer. Loving was observed dropping the white sack he had carried with him from the Yukon to the Blazer.

d. As agents removed Sowell and Loving from the Blazer, a large amount of U.S. Currency was visible on the dashboard and spilling down on to the floor. The white sack that Loving dropped was recovered and found to contain three smaller plastic bags with approximately 250 grams of cocaine. At the same time, a seventeen year old juvenile male was removed from the Yukon. Located on the floor of the Yukon within reach of the juvenile was a shoe box containing approximately 500 grams of cocaine.

e. Law enforcement also recovered an AR 15 rifle, 9 mm handgun ammunition, .40 caliber handgun ammunition and .223 ammunition from the Yukon. The AR 15 was located in the rear of the Yukon, the ammunition was located in the center console next to the driver's seat in the front of the Yukon.

f. Sowell, Loving and the juvenile male (JM) were transported to the Indianapolis District Office of the DEA. Sowell and Loving were read their Miranda Warnings by law enforcement and both signed a waiver of their Miranda Rights and agreed to make a statement to law enforcement.

g. Sowell said that he has maintained a drug trafficking relationship with Loving for approximately one year. Sowell stated he was present at the Menard's lot to meet with Loving and purchase a quantity of cocaine. Sowell advised he had purchased cocaine and crack cocaine from Loving during the time frame of their drug trafficking relationship on no fewer than ten occasions. Sowell said he normally purchased multi-ounce quantities of crack cocaine from Loving on most of the ten prior transactions. Sowell also admitted that he purchased multi-ounce quantities of cocaine from Loving. Sowell expected to purchase as much cocaine or crack cocaine from Loving at the Menard's as Loving would provide him. Sowell believed he had $2,500.00 - $3,500.00 in U.S. Currency. Sowell would pay Loving for a portion of the cocaine

and Loving would “front”, or advance, Sowell the remaining quantity of cocaine. Sowell also admitted that he had a prior drug felony conviction for cocaine.

h. Loving said that he was present in the Menard’s lot to sell a quantity of cocaine to Sowell and to meet with the CS as well. Loving admitted to selling cocaine to Sowell over the time frame of approximately one year. Loving stated he sold multi-ounce quantities of crack cocaine and powder cocaine to Sowell. Loving stated he was planning to sell Sowell nine ounces of powder cocaine in the Menard’s parking lot at the time of his arrest. Loving had expected to receive approximately $5,400.00 from Sowell. Loving said he had borrowed the Yukon from another “friend” and was not aware of the AR 15 or the ammunition in the vehicle. Loving advised he “laid his head” at several houses and didn’t really live at any one house. Loving had his vehicles registered in different names and used other individuals vehicles to deliver cocaine. Loving advised that the JM was the younger brother of Loving’s pregnant girlfriend, Dietra Parker. Loving stayed with Parker, the JM and Parker’s two other young children most nights. Loving admitted that he had a prior drug felony conviction for cocaine and that he previously carried firearms.

i. Law enforcement transported the JM to his residence located at 9401 Rochelle Drive, Indianapolis. At that location, law enforcement spoke with Loving’s girlfriend, Dietra Parker, who was also the legal guardian of the JM. Parker allowed JM to speak with law enforcement and was present during JM’s statement. Parker and the JM signed the Miranda Rights Waiver. JM said that Loving was his sister’s boyfriend. Loving had picked up JM in the afternoon of January 5, 2006 and advised JM he was going to make some “stops”. JM had prior knowledge that Loving dealt cocaine. JM advised he and Loving drove to the Menard’s parking lot and JM observed Loving remove the white sack containing the suspected cocaine. JM observed Sowell

in the white Blazer and observed Loving carry the white sack to Sowell. JM also said that Loving stayed at the Rochelle street address.

j. Law enforcement recovered two firearms from the bedroom where Parker and Loving stayed. Parker said the firearms belonged to Loving. One firearm was a loaded MAK 90 assault rifle located in the bedroom closet and a loaded Ruger .45 handgun, which an NCIC check revealed was stolen, located under the bed mattress. Parker advised law enforcement that she was aware the Loving was a cocaine trafficker. Parker is six months pregnant with Loving's child. Law enforcement also recovered paperwork and airline ticket information from the Rochelle street address in Loving's name.

k. The evidence demonstrates a strong probability of conviction.

l. The mandatory minimum sentence of 5 years, when coupled with the defendants' criminal histories, substantially increases the seriousness of their risk for flight.

m. The defendants' prior convictions for narcotics related offenses, and failure to appear at previous court proceedings demonstrates that they are a serious risk to commit other crimes if released.

The Court having weighed the evidence regarding the factors found in 18 U.S.C. §3142(g), and based upon the totality of evidence set forth above, concludes that if the defendants had rebutted the presumptions in favor of detention, they nevertheless, would be detained, because they are serious risks of flight and clearly and convincingly dangers to the community.

WHEREFORE, Zacharius Sowell and Livi Loving are hereby committed to the custody of the Attorney General or his designated representative for confinement in a corrections

facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal. They shall be afforded a reasonable opportunity for private consultation with defense counsel. Upon order of this Court or on request of an attorney for the government, the person in charge of the corrections facility shall deliver the defendants to the United States Marshal for the purpose of an appearance in connection with the Court proceeding.

Dated this ____ day of January, 2006.

KENNARD P. FOSTER
U.S. Magistrate Judge
Southern District of Indiana

Distribution:

Barry D. Glickman,
Assistant U. S. Attorney
10 West Market Street, #2100
Indianapolis, Indiana 46204

James C. McKinley
Attorney at Law
Indiana Federal Community Defenders
111 Monument Circle #752
Indianapolis, Indiana 46204

Kevin McShane
Attorney at Law
235 N. Delaware Street
Indianapolis, Indiana 46204

U. S. Probation, Pre-Trial Services

U. S. Marshal Service